Continuity in Morality and Law

*Re'em Segev**

According to an influential and intuitively appealing argument (the Continuity Argument), (1) morality is usually continuous, namely, a gradual change in one morally significant factor triggers a gradual change in another; (2) the law should usually track morality; (3) therefore, the law should often be continuous. This argument is illustrated by cases such as the following example: since the moral difference between a defensive action that is reasonable and one that is just short of being reasonable is small, the law should not impose a severe punishment when the action is almost reasonable and no punishment at all when the action is reasonable (as positive law sometimes does). In this Article, I consider two doubts regarding this argument. First, the premise that morality is continuous in such cases is incompatible with the common view that the moral status of actions is not continuous since there is an important difference between actions that are permissible and actions that are wrong—even if this difference is due to a difference that is very small, such as the one between an action whose consequences are the best and an action whose consequences are just slightly less good. This view extends also to the overall moral status of agents given the common assumption that it depends on the moral status of their actions. This is an important challenge that the Continuity Argument should confront. However, I argue that the best account of morality is more scalar than the common view in these respects. Therefore, I conclude that the first premise of the Continuity Argument is correct in this regard, although it is based on a minority view. The second doubt concerns the scope of the second premise: since there are reasons both in favor

* Ivan C. Rand Chair in Criminal Law, The Hebrew University of Jerusalem. I am grateful to Adam Kolber, Shahar Eldar, Ofer Malcai, Omer Pelled, Dana Gur, Gaia Segev, Amihai Wasserteil, and to the participants in the Conference on Legal Discontinuity at Tel Aviv University for helpful comments; to Inbar Gil for excellent research assistance; and to the Israel Science Foundation for financial support (Grant 888/18). Cite as: Re'em Segev, *Continuity in Morality and Law*, 22 Theoretical Inquiries L. 45 (2021).

and against legal continuity, and the applicability and force of these reasons depend not only on various moral propositions but also on contingent non-moral facts, we often lack the evidence to determine the degree to which the law, at a certain place and time, should be continuous, and specifically that it should often be continuous.

Introduction

Consider the following argument (the Continuity Argument) regarding morality, the law, and the relation between them:

1. Morality is usually continuous.
2. The law should usually track morality.
3. Therefore, the law should often be continuous.

The conclusion of the Continuity Argument is the basis of an auxiliary argument concerning positive law (which is similar, in the relevant respects, in many countries):

3. The law should often be continuous (the conclusion of the Continuity Argument).
4. The law is often discontinuous.
5. Therefore, the law should be amended so that it is often continuous.

The Continuity Argument is appealing and influential. Indeed, it is supported by people whose normative outlooks are very different. For example, one common version of this argument assumes a deontological theory that emphasizes the importance of desert and accordingly condemns criminal punishment that exceeds the degree to which the agent is blameworthy.[1] In contrast, the Continuity Argument has been promoted more generally by Adam Kolber who espouses a consequentialist position that rejects (even a consequences-based version of) desert.[2]

---

1 *See, e.g.*, Douglas Husak, Overcriminalization: The Limits of the Criminal Law (2008) [hereinafter: Husak, Overcriminalization].

2 *See* Adam Kolber, *Smooth and Bumpy Laws*, 102 Calif. L. Rev. 665, 683 (2014) [hereinafter: Kolber, *Smooth and Bumpy Laws*]; Adam Kolber, *The Bumpiness of Criminal Law*, 67 Ala L. Rev. 855, 858, 862 (2016) [hereinafter: Kolber, *Bumpiness of Criminal Law*] ("the criminal law is likely bumpier than necessary"; "I have argued that our leading moral justifications for punishment generally call for smooth relationships between legal inputs and outputs. Yet I will show that the criminal law is frequently bumpy"); Adam Kolber, *Smoothing Vague Laws, in* Vagueness and Law: Philosophical and Legal Perspectives 275, 280, 294 (Geert Keil & Ralf Poscher eds., 2016) [hereinafter Kolber, *Smoothing Vague Laws*] ("Morality is usually smooth, but the law is usually bumpy... we can often

The Continuity Argument focuses especially on the part of morality that is concerned with the *overall moral status of actions*—whether they are obligatory, permissible or wrong (for example)—and the overall *moral status of agents*—whether they are (more or less) praiseworthy or blameworthy. The sense of continuity that is employed in this argument is that a gradual change in one morally significant factor—such as the degree to which an action is wrong or an agent is blameworthy—triggers a gradual change in another factor that is morally significant—for example, the appropriate legal sanction. Kolber illustrates the argument (inter alia) with examples that focus on the overall moral status of actions and agents. One example concerns the criminal law: he argues that since the moral difference between a defensive action that is reasonable and one that is just short of being reasonable is small, the law should not impose a severe punishment on the agent whose action was almost reasonable, as compared to no punishment at all in the case of the reasonable action (as positive law sometimes does).[3] Another common example concerns tort law: since the moral difference between driving in a way that is completely reasonable and driving in a way that is just slightly unreasonable is small, the law should not require the almost reasonable driver to pay millions in compensation if her action caused a serious accident, as compared to nothing at all in the case of a completely reasonable driver who caused a similar accident.[4]

Is the Continuity Argument sound? The argument is valid: assuming plausible senses of "usually" and "often," the conclusion follows from the premises (for example, if "usually" is understood as 80% and "often" as 64%).[5] However, there are doubts regarding each of the two premises of the argument.

The first doubt concerns the first premise that morality is usually continuous, and specifically that the part of morality that is concerned with the overall moral status of actions and agents is continuous. This proposition is incompatible with the common view that the overall moral status of actions and agents is discontinuous in an important respect. According to this view, there is an important difference between actions that are right—obligatory or at least permissible—and actions that are wrong. This is the case, this view holds, even if the difference between actions that are right and actions that are wrong

---

make the law smoother, and we should when bumpy laws come at too high of a moral cost"; "The set of situations requiring bumpy solutions – cases having what I call 'bumpy needs' – may be relatively small").

3 *See* Kolber, *Bumpiness of Criminal Law*, *supra* note 2, at 856.

4 *See* Kolber, *Smoothing Vague Laws*, *supra* note 2, at 279.

5 My discussion does not depend on the exact way in which these terms are understood.

is due to a difference that is very small, such as the difference between an action whose consequences are the best and an action whose consequences are just slightly less good. Indeed, according to this view, even if all of the *pro tanto* moral factors that affect the moral status of actions and agents are continuous, the conclusions that are entailed by these factors—regarding the *overall* moral status of actions and agents—are not continuous.

This is the case most obviously given the standard, maximizing, version of consequentialism, according to which the action whose overall consequences are the best is always obligatory, whereas any other action, including an action whose overall consequences are just slightly less than the best, is wrong.[6] For example, utilitarianism classifies the action that produces the highest sum of wellbeing as obligatory, and the action that produces just slightly less wellbeing as wrong. Similarly, a theory that incorporates just one consideration of (moral) desert classifies the action that brings about the best possible correspondence between virtue and wellbeing as obligatory, and an action that produces just slightly less correspondence between virtue and wellbeing as wrong. The same is true for a more complex consequentialist theory that includes several considerations, for example, in favor of maximizing wellbeing while giving priority to the worse-off and to the more deserving (in accordance with the degree to which they are worse-off or more deserving, respectively). Such a theory classifies the action that brings about the best overall consequences in terms of the balance of these factors as a duty, and an action that is almost as good as wrong. In this respect, the standard version of consequentialism is incompatible with the first premise of the Continuity Argument.

The fact that prominent consequentialist theories are incompatible with this premise is especially noteworthy since the Continuity Argument is more appealing, to begin with, with respect to consequentialist theories, due to the fact that moral factors that relate to consequences are generally more continuous than deontological ones. However, the Continuity Argument is also incompatible with standard deontological theories for two reasons. First, common deontological constraints—such as a constraint on harming people intentionally—are discontinuous to begin with. Second, standard deontological theories consider consequences as morally significant[7] and accordingly hold that *sometimes* (when deontological constraints and permissions do not apply or when they are defeated by clashing consequential considerations) the action

---

6 *See, e.g.*, William Shaw, *The Consequentialist Perspective*, *in* Contemporary Debates in Moral Theory 5-6 (James Dreier ed., 2006).

7 *See* John Rawls, A Theory of Justice 3 (1971) ("All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy").

whose overall consequences are the best is obligatory, whereas an action whose overall consequences are just slightly less good is sometimes wrong.

The significance of the common view is demonstrated, inter alia, by the controversy regarding the demandingness of morality; specifically, whether the fact that the standard form of maximizing consequentialism is very demanding, since it holds that only the action whose overall consequences are the best is permissible (and accordingly that every other action, including, for example, the second best action, is wrong), controverts this view.[8] The extensive debate regarding this question demonstrates that the difference between actions that are permissible and actions that are wrong is typically considered to be very important.

This common view regarding the overall moral status of actions extends also to the moral status of agents, based on the widely held assumption that the moral status of agents depends (only or also) on the moral status of the actions for which they are responsible.[9] According to this view, those who are responsible for actions that are obligatory or commendable are praiseworthy, whereas those who are responsible for wrongful actions are blameworthy. As a result, on the common view the moral status of agents is considered discontinuous as well.

Thus, according to the common view, what may seem like a small difference in the moral status of the actions and the agents in the self-defense and accident cases, for instance, is in fact a momentous difference: the difference between self-defense that involves reasonable force and self-defense that involves

---

8 *See, e.g.*, Samuel Scheffler, The Rejection of Consequentialism 7-8 (1982); Shelley Kagan *Does Consequentialism Demand Too Much? Recent Work on the Limits of Obligation* 13 Phil. & Pub. Aff. 239; Shelley Kagan, *The Limits of Morality* (1989); Peter Singer, Practical Ethics 229-30 (1993); Peter Unger, Living High and Letting Die: Our Illusion of Innocence 56 (1996); Liam B. Murphy, Moral Demands in Nonideal Theory (2000); Brad Hooker, Ideal Code, Real World: A rule-consequentialist theory of morality 27 (2000); Alastair Norcross, *Reasons Without Demands: Rethinking Rightness*, *in* Contemporary Debates in Moral Theory 218-20 (J. L. Dreier ed., 2006) [hereinafter Norcross, *Reasons Without Demands*].

9 *See, e.g.*, Larry Alexander & Kimberley Ferzan, Crime and Culpability: A Theory of Criminal Law 199-209 (2009); Larry Alexander & Kimberley Ferzan, Reflections on Crime and Culpability: Problems and Puzzles 186 (2018); Larry Alexander, *Is There a Case for Strict Liability?* 12 Crim. L. & Phil. 531-32 (2018) [hereinafter: Alexander, *Strict Liability*]; Kerah Gordon-Solmon, *What Makes a Person Liable to Defensive Harm* 97 Phil. & Phenomenological Res. 543, 564 (2018); David Brink, *The Nature and Significance of Culpability* 13 Crim. L. & Phil. 347, 350 (2019).

force that is just short of being reasonable, or between driving in a way that is completely reasonable and driving in a way that is just slightly unreasonable, is the difference between an action that is right and an action that is wrong (and between an agent who is praiseworthy, or at least "innocent," and an agent who is blameworthy). If the common view is correct in this respect, the very different legal outcomes in these examples are called for and the Continuity Argument is inapplicable (since its first premise does not apply in these cases).

Of course, the fact that the first premise of the Continuity Argument is incompatible with the common view does not entail that the first premise is false. Indeed, although the common view may seem reasonable—after all, the difference between what we should do and what we should not do does not appear to be trivial—I think that it is misguided. In order to demonstrate that, I evaluate the controversy between the standard (maximizing) version of consequentialism, which is incompatible with the premise that the relevant part of morality is continuous, and the much less common, and more radical, version of scalar consequentialism, which is in line with this premise. I argue that the radical version is more plausible. I therefore conclude that the first premise of the Continuity Argument is after all safe in this regard, at least regarding the part of morality that is concerned with the overall moral status of actions and agents, but only if we accept a radical and unpopular view (as I think we should).

The second doubt regarding the Continuity Argument concerns its second premise (and, as a result, the conclusion of the argument), namely, the claim that the law should track the relevant part of morality—the one that is concerned with the overall moral status of actions and agents—*usually*. This premise reflects a view regarding the proper resolution of the conflict that often exists in legal contexts (as well as in other practical contexts) between considerations that support an accurate reflection of factors such as the moral status of actions and agents and considerations in favor of simplicity and clarity (as a means of achieving other moral goals, such as preventing undeserved suffering).[10] However, it is important to note that the foundational considerations both for

10 Another familiar context in which this tension exists, in addition to the one that is the focus of the Continuity Argument, is the choice between standards and rules. Kolber suggests that the questions concerning the choice between standards and rules, on the one hand, and continuous and discontinuous laws, on the other hand, are related in a way that is merely superficial (Kolber, *Smooth and Bumpy Laws*, *supra* note 2, at 668). But I think that in terms of the most important issue—the considerations for and against each of these alternatives—there is no difference between these questions.

and against continuity are the same (for example, a reason against undeserved suffering). These considerations sometimes support laws that track the relevant part of morality—the moral status of actions and agents—but sometimes militate against such laws. Moreover, the applicability and force of these considerations depend not only on various moral propositions but also on contingent (non-moral) facts. Therefore, it is difficult to determine the degree to which the law (at a certain place and time) should be continuous, including whether it should "usually" be continuous, without an extensive inquiry regarding numerous empirical questions concerning the effects of many possible laws. Thus, it seems that the tendency to prefer the reasons for, rather than against, legal continuity is at least partly due to a bias towards the short term as opposed to the long term. Therefore, I do not think that we have the evidence to determine that the law should usually be continuous, and accordingly that the law (at a certain place and time) is not as continuous as it should be. Indeed, it seems to me that the possibility that the law is, overall, *more* continuous than it should be is just as likely as the possibility that it is less continuous than it should be.

This Article considers these doubts. I begin by exploring in Part I the doubt regarding the first premise, namely, the continuous nature of the relevant part of morality, focusing especially on the objection that there is an important difference between wrongful and permissible actions. I then consider in Part II the doubt regarding the second premise, pointing out that the considerations for and against tracking the relevant part of morality through the law are, ultimately, the same considerations, and explaining why I believe that the claim that the considerations in favor of legal continuity are always or even merely usually decisive is doubtful. Finally, in Part III I consider, more specifically, some aspects of the controversy regarding partial defenses in the criminal law, since this discussion illustrates several points that are relevant to the Continuity Argument in its general form. This is because some of the arguments for and against partial defenses focus on the degree to which morality is continuous in various respects and on the extent to which the law should be continuous as well in order to reflect moral continuity. This discussion has some interesting implications, for example, that when the difference between actions that are permissible and actions that are wrong only in the sense that they are not perfect is small, there does not seem to be much point in distinguishing between complete and partial justificatory defenses to begin with.

My focus throughout the paper is on the Continuity Argument, whose focus is on the question of what the law should be. I will for the most part ignore the auxiliary argument regarding positive law. Obviously, these arguments are related. Specifically, the discussion of the Continuity Argument is relevant to

the auxiliary argument, as the latter argument assumes the conclusion of the former. But the auxiliary argument requires also the evaluation of the degree to which positive law (at various places and times) is continuous, not only in terms of more formal expressions of the law (such as legislation) but also in terms of the way that they are implemented, for instance, the way in which judges employ their discretion regarding matters such as sentencing in the criminal law and compensation in tort law.

I. The First Premise: Scalar Morality

Our first question is therefore the degree to which morality is continuous. Specifically, the question concerns the part of morality that is at the focus of the Continuity Argument, namely, the overall moral status of actions (and agents to the extent to which the two are related). I first appraise (in section I.A) which pro tanto considerations—that is, facts that count in favor of actions or against them—are continuous, and then (in section I.B) whether overall moral conclusions, regarding the all-things-considered status of actions, are continuous. Regarding the first question, I point out that consequences-based considerations are more often continuous than deontological ones. However, there are important respects in which consequences-based considerations are discontinuous and deontological considerations are continuous. It is also important to recall that standard deontological theories include also consequences-based considerations, in addition to deontological ones.[11] Therefore, such theories are continuous to the degree to which consequences-based considerations are continuous.

With regard to the relation between pro tanto considerations and overall conclusions, the common view is that even if all of the pro tanto considerations are continuous, there is one respect in which the overall moral status of actions is discontinuous, namely, that some actions are permissible and some are wrong. However, it seems reasonable to assume that the degree to which the pro tanto considerations that are relevant to the moral status of actions are continuous affects the degree to which the overall moral status of actions is continuous. The more continuous the relevant pro tanto considerations are, the more reason there is to assume that the all-things-considered conclusions that reflect the balance of these considerations are also continuous. Indeed, to the extent to which the pro tanto considerations are *not* continuous there is no (or at least much less) reason to assume that the overall moral status of

11 In this respect, standard deontological theories are different than consequentialist theories that include only consequences-based considerations.

actions is continuous, and accordingly there is not even a prima facie case for the first premise of the Continuity Argument.

The following discussion of the degree to which morality is continuous is of course not exhaustive; its goal is mainly to consider the challenge that the common view presents to the first premise of the Continuity Argument regarding the overall status of actions (and consequently agents).

One preliminary clarification is important before we continue. Considering the degree to which (the relevant part of) morality is continuous is complicated due to the controversies regarding the question of which facts are morally significant (at all or in the relevant respect). Indeed, the moral significance of each of the considerations that are considered below is controversial. Exploring which of these considerations is indeed morally significant is obviously beyond the scope of this Article. I therefore consider the degree to which salient considerations that are often considered to be morally significant are continuous, assuming, for the sake of the discussion, that they are morally significant (in the relevant respect).

However, there are several controversies that it is important to flag in this context. One is whether, or in what way, the moral status of one action is morally significant in itself for the moral status of other actions, including actions that may be described as responses to the original action. A common view holds that the (overall) moral status of an action is relevant as such to the justification of such responses, for instance, that there is a reason to prevent wrongful actions, to punish agents whose actions are wrong, or to require such agents to compensate those who are harmed by their wrongful actions. In contrast, I think that the moral status of an action is not important in itself with regard to the response to this action; I believe that the moral status of actions matters in this respect only if and to the degree to which it is related to the moral status of *agents* and to the moral status of the *consequences* of the actions.[12] However, since the former view is often assumed in discussions of the Continuity Argument,[13] I sometimes assume it, for the sake of the discussion, in order to consider other issues that pertain to the continuous nature of morality.

---

12 I argue for this view in other places. See, for example, Re'em Segev, *Actions, Agents, and Consequences* (unpublished manuscript) (on file with author); Re'em Segev, *Reasons for and against Criminalization: Discussion of The Realm of Criminal Law*, 18 Jerusalem Rev. Legal Stud. 16, 21-28 (2018).

13 *See infra* Part III. Kolber, for example, appears to accept this view when he considers the self-defense and the accident examples; *Supra* Introduction. Kolber sometimes refers in this context to the moral status of agents in addition to or instead of the moral status of actions, but it seems that this is based on the assumption that the two are related.

Another pertinent question is whether what matters for the moral status of actions are the morally significant *facts* or the (actual or justified) *beliefs* of the agents regarding these facts. (According to a third view, both of these factors matter, in different ways, to the moral status of actions.) I think that the most plausible view is that at least the most basic sense of the moral status of actions (as opposed to the moral status of persons, including as agents) is concerned with facts and not with the beliefs of agents.[14] However, since the latter view is often assumed in discussions of the Continuity Argument,[15] I sometimes assume, in what follows, that beliefs matter in this respect.

Finally, another controversy concerns the relation between the moral status of actions and the moral status of persons. A common view relates these issues by assuming that the moral status of agents depends, either only or at least also, on the moral status of their actions, namely, that a person who is responsible for a right action is, in this respect, praiseworthy, whereas a person who is responsible for a wrong action is, in this respect, blameworthy. Another view holds that the moral status of persons depends on their character or mental states and not on their actions. While the latter view may be more plausible, the former is very common, especially in the legal context,[16] and therefore I often assume it, for the sake of the discussion.

A. Pro Tanto Considerations

The first question is therefore the degree to which the basic pro tanto considerations that affect the overall moral status of actions (and agents) are continuous. There are salient considerations that appear to be continuous in some respects. These include mainly some aspects of influential consequential considerations. One type of examples is considerations that refer to the wellbeing of individuals, since the facts that affect the degree to which the life of a person is good (her wellbeing), such as her happiness, seem to be, at least mostly, a matter of degree. Accordingly, the force of considerations whose currency is wellbeing appears to be continuous. These include, for example, the reason to maximize the wellbeing of individuals; the view that

---

14 I discuss this question further and explain what I mean by "the most basic sense." See Re'em Segev, *Justification Under Uncertainty*, 31 Law & Phil. 523 (2012).

15 Kolber, for example, seems to assume that the beliefs of agents are important to the moral status of their actions when he considers the self-defense and the accident examples (assuming that what is "reasonable" in the relevant respects refers, inter alia, to various probabilities and that probabilities are relevant only in the framework of beliefs).

16 *Supra* note 9.

the reason to maximize individual wellbeing is stronger the worse-off the person is;[17] the reason to minimize inequality in terms of wellbeing;[18] and the view that the level of individual wellbeing should reflect what the relevant person (morally) deserves, in light of her actions, intentions, or character.[19] Deontological reasons whose currency is wellbeing appear to be continuous in a similar way. These include deontological variations of distributive and retributive reasons, for instance, a deontological reason to act in a way that is equal, in terms of wellbeing, and a deontological reason to act in a way that gives people what they deserve, in terms of wellbeing. (These reasons are different from consequences-based reasons since they focus on the effects of one's *action* rather than on other factors that affect wellbeing.) And this is the case regarding other aspects of distributive and retributive considerations as well. For example, plausible accounts of considerations of desert, such as those that consider the beliefs of people as relevant to the question of what these people deserve, appear to appeal to continuous notions, for instance, to the extent that beliefs are probabilistic.

There are, however, several aspects of morality that do not appear to be continuous in the relevant way. One is that consequences, and accordingly considerations regarding consequences, are discontinuous in an important respect: actions that are very similar, and even identical, in every way that is morally significant may have very different consequences (that are morally significant): some actions cause harm, for example, while others do not (and some harmful actions cause much more harm than other harmful actions).[20]

---

17 *See* Derek Parfit, *Equality and Priority*, *in* The Ideal of Equality 81 (Matthew Clayton & Andrew Williams eds., 2002).

18 Although it is difficult to measure the degree of inequality when more than two persons are involved, it seems reasonable to assume that the relevant variables are also continuous. See Larry Temkin, Inequality 50-52 (1993).

19 *See*, e.g., Shelly Kagan, The Geometry of Desert (2012).

20 An objection could be made that the proposition that actions that are identical in every morally significant respect may have very different consequences is incoherent, since the consequences of actions are a constitutive element of the actions. However, even if we assume, for the sake of the argument, that this is the case, this objection does not affect the main point, namely, that a difference that is small in terms of one factor that is morally significant (the constitutive aspects of actions apart from their consequences) sometimes generates a dramatic difference in another factor that is morally significant, namely, the consequences of actions. Whether or not we describe the first factor as *all* of the factors that affect the moral status of actions, as my initial proposition did, or as *part* of the factors that affect the moral status of actions, as the objection suggests, is not important in this respect.

It is uncontroversial that (some) consequences of actions are morally significant in several ways. First, some states of affairs are morally good or bad: for example, other things being equal, a state of affairs in which a person suffers undeserved harm is worse than a state of affairs in which she does not. Second, according to a plausible and common view, the overall moral status of actions also depends on their consequences (according to another view, what matter in this respect are the beliefs of the agents regarding the morally significant facts).[21] Third, there is a reason to prevent actions whose overall consequences are not optimal, as a means of preventing these consequences (inter alia by legal means). Finally, according to another (more controversial) view, the moral status of agents—the degree to which they are praiseworthy of blameworthy—also depends (not only on their actions but also) on the consequences of their actions, even when these consequences are a matter of luck (another view rejects this type of moral luck and holds that the moral status of agents is not affected by the consequences of their actions).[22] These views are discontinuous in that they judge very differently actions and agents that are very similar (or even identical) in all of the relevant moral respects, apart from their consequences.

Kolber seems to downplay these respects in which morality is less continuous due to luck in two ways when considering (his version of) the Continuity Argument. First, he sometimes points out that "dangerousness"—the probability, given the available evidence, that a person will perform an action whose consequences are not optimal—is a matter of degree, and assumes that this factor is relevant to the law, namely, that, for example, the degree to which a person is dangerous affects the force of the reason to punish her.[23] However, even if this factor—the probability of bad results—is important in relevant ways (and this is controversial), it is plausible to assume that actual consequences—rather than the probability of their occurrence—are also morally significant in other ways that are relevant to the law. Second, Kolber says that views that embrace moral luck are compatible with the assumption that morality is continuous since they merely consider another continuous variable, for example, harm, as morally significant.[24] However, while the latter claim is correct, the former is inaccurate. There is an important sense in which views that endorse moral luck are discontinuous, for they hold that the moral status of agents whose actions are (otherwise) very similar may be

---

21 *See supra* Part I.

22 *See*, e.g., Dana Nelkin, *Moral Luck, in* The Stanford Encyclopedia of Philosophy (2019).

23 *See* Kolber, *Bumpiness of Criminal Law*, *supra* note 2, at 858.

24 *Id.* at 859-60.

very different. Indeed, Kolber himself often emphasizes that the *legal* status of very similar actions may be very different due to this difference, namely, when one action results in harm and another does not (for instance, since the law of torts requires compensation only when there is harm).[25] According to views that endorse moral luck, this—non-continuous—legal position may be justified, even assuming that what matters in terms of the justification of the relevant law is the degree to which the agent is blameworthy.

Another factor that does not seem to be completely continuous concerns considerations of desert. Such considerations often regard (also or only) some of the intentions of people (for example, the intention to harm a person or to benefit a person) as affecting the degree to which they are deserving. But at least in some ways that are often considered to be significant in this respect, the difference between having a certain intention and not having it is not a matter of degree. Accordingly, considerations of desert that appeal to intentions are in this respect discontinuous. (This is true with regard to both consequential and deontological considerations of desert.)

Lastly, salient deontological constraints are discontinuous in several ways. Consider, for example, the most common versions of deontological constraints, such as those that forbid *harming* people, or harming people *intentionally*, or using people *as a means*.[26] There is an important difference, according to these views, between, for example, killing a person and letting a person die, or between killing a person intentionally and not killing a person intentionally (including killing a person in a way that is not intentional), or between using a person as a means and not doing so. Accordingly, the overall moral status of these actions is very different. Of course, the extent to which this is the case needs to be considered with regard to other deontological constraints as well, but it seems safe to conclude that at least (the most) salient deontological constraints are discontinuous.

There are, however, several senses in which common deontological constraints are nevertheless continuous. First, these constraints appear to be continuous to the extent to which they are sensitive to probabilities, for example, if they apply only beyond a certain probabilistic threshold, for instance, if they forbid creating a certain level of risk of harming a person.[27] For the difference between lower and higher probabilities is presumably (at least for the most part) gradual. Second, some accounts determine the scope of deontological constraints also in light of consequential factors. According

---

25 *Id.* at 876.

26 *See, e.g.*, Shelly Kagan, Normative Ethics 70-105 (1998).

27 *See, e.g.*, Larry Alexander, *Deontology at the Threshold* 37 San Diego L. Rev. 893, 904-905 (2000) [hereinafter: Alexander, *Deontology*].

to one view, for example, deontological constraints do not apply when there are (very) strong consequential reasons in favor of an action that is otherwise within the ambit of the constraint. (Another view is that such consequential reasons do not affect the scope of the constraint but may clash with the deontological reason and defeat it.) To the extent that these consequential considerations are continuous, the deontological constraints whose scope depend on them are also continuous.

Finally, according to some views, morality is, to a certain extent, vague. For example, some think that deontological constraints are decisive unless the force of clashing consequential reasons exceeds a certain threshold and that this threshold is vague.[28] This view may be relevant to the degree to which morality is continuous. On the one hand, the claim that (a certain aspect of) morality is vague assumes that there *are* important moral boundaries: that some actions are permissible and some are not, for example; it just adds that some other (borderline) actions are neither. On the other hand, if morality is vague to some degree, this does make it more continuous in another sense, namely, that the line between what is permissible and what is not, for example, is not sharp. However, note that the implications of moral vagueness with regard to questions such as what people deserve, for instance, are not obvious.

To conclude: it appears that some salient pro tanto considerations, which are relevant to the overall moral status of actions, are continuous, but others are not. Generally, it seems that consequential considerations tend to be more continuous than deontological ones, although the former are not completely continuous and the latter are not completely discontinuous.[29] Therefore, the first premise of the Continuity Argument, according to which the overall moral status of actions is continuous, is more plausible in accordance with the degree to which the relevant part of morality (the pro tanto factors that affect the moral status of actions) includes more consequential considerations, and especially on a consequentialist view according to which all of the relevant considerations are consequential. In this respect, the Continuity Argument depends on the controversy between consequentialism and deontology. Accordingly, the first

---

28 For this controversy, see, for example, Russ Shafer-Landau, *Vagueness, Borderline Cases and Moral Realism*, 32 Am. Phil. Q. 83 (1995); Larry Alexander, *Scalar Properties, Binary Judgments*, 25 J. Applied Phil. 85 (2008) [hereinafter: Alexander, *Scalar Properties*]; Matti Eklund, *Being Metaphysically Unsettled: Barnes and Williams on Metaphysical Indeterminacy and Vagueness*, *in* 6 Oxford Studies in Metaphysics 149 (Karen Bennet & Dean W. Zimmerman eds., 2011); Cristian Constantinescu, *Moral Vagueness: A Dilemma for Non-Naturalism*, *in* 9 Oxford Studies in Metaethics 152 (Russ Shafer- Landau ed., 2014); Miriam Schoenfield, *Moral Vagueness is Ontic Vagueness*, 126 Ethics 257, (2016).

29 Alexander, *Scalar Properties*, *supra* note 28.

doubt regarding the first premise of the Continuity Argument, which I consider below, is important especially on the assumption of consequentialism.[30]

B. The Overall Moral Status of Actions and Agents

We can now consider the main doubt regarding the first premise of the Continuity Argument, namely, whether, or to what degree, the *overall* moral status of actions is continuous and, specifically, what is the significance of the difference between the best action and other actions, including the second best action, especially the second best action that is very similar to the best action in terms of the factors that are morally significant, such as their consequences.

This question is particularly relevant to the Continuity Argument not only because the answer affects the degree to which the relevant part of morality is continuous, but also for other reasons. First, the arguments for and against the competing answers to this question are similar in an important respect to the arguments regarding the second premise of the Continuity Argument that is concerned with the degree to which the *law* should be continuous: both types of arguments focus on the question whether a continuous input should entail a continuous output. Second, if the common assumption that the moral status of actions affects the moral status of agents is correct, the degree to which the former is continuous affects also the degree to which the latter is continuous.[31]

It is therefore interesting to note that the common view, which is accepted by both consequentialists and deontologists,[32] considers the overall moral status of actions to be *discontinuous*: it attaches a lot of significance to the difference between actions that are right—obligatory or at least permissible—and actions that are wrong, even when the input—the pertinent pro tanto factors that affect the overall moral status of actions—are all continuous.

---

30 Leo Katz, Why the Law is so Perverse (2011) (considering other claims regarding the degree to which morality is continuous).

31 An objection could be made that even if the moral status of action is not continuous, the moral status of agents is, if (as it is reasonable to believe) the number of moral and immoral actions that an agent performs affects her moral status. This is true to some degree, but it is compatible with my claim that the degree to which the moral status of actions is continuous affects the degree to which the moral status of agents is continuous. For (given the assumption that the moral status of agents depends on the moral status of their actions), if there are also *additional* respects in which the moral status of actions is continuous, this affects the extent to which the moral status of agents is continuous.

32 See the discussion and references in the Introduction.

Kolber does not consider the incompatibility of the Continuity Argument with this common view. He seems to assume that the overall moral status of actions is continuous. Indeed, his main examples of the continuous nature of morality, such as the self-defense and the accident examples, refer to the overall moral status of actions (and agents, based on the assumption that these are related).[33] He assumes that the difference between actions that are right ("reasonable") and actions that are wrong is sometimes small (when the latter actions are "unreasonable" only to a small degree and in that sense not very different from the former, "reasonable," actions). And he does not consider the objection that there is an important difference between right and wrong actions, although this objection appears to be entailed by the common view in this regard.

The contrast between the common view and the first premise of the Continuity Argument is especially interesting in the context of a consequentialist account (such as Kolber's), in light of the conclusion that considerations relating to consequences are more continuous than deontological ones. Indeed, it seems that at least the overall evaluation of states of affairs is commonly assumed to be continuous. All consequentialist accounts rank states of affairs from the best to the worst, and while the nature of the differences between (better and worse) states of affairs depend on the content of—and accordingly vary in accordance with—different consequentialist theories, it seems that at least typically these differences are assumed to be continuous. For example, all consequentialist theories appear to consider the degree to which the suffering of virtuous persons (who do not deserve to suffer) is bad as continuous. Therefore, it is interesting to consider the controversy between the common view and the view that the overall status of actions is wholly continuous in light of the arguments in the debate between standard (maximizing) consequentialism, which follows the common view and endorses a dichotomous (discontinuous) distinction between right and wrong actions, even when all the relevant pro tanto considerations are continuous, and scalar consequentialism, which seems to imply that this distinction is misguided.

My suggestion that it is interesting to explore the controversy between the common view and the view that the overall status of actions is wholly continuous in the context of consequentialist theories, does not seem to be in line with Larry Alexander's claim that the problem of explaining binary conclusions that seem to reflect scalar properties is a problem only for deontological accounts, but not consequentialist ones.[34] However, (standard) consequentialist accounts face this problem too in an important respect, which is in one sense even more

---

33 These examples are mentioned in the Introduction.

34 *See* Alexander, *Scalar Properties*, *supra* note 28, at 86.

pressing: since such accounts assume that the basic moral properties are more continuous (as compared to deontological accounts), it is especially puzzling that they adopt a binary view regarding the overall moral status of actions.

1. The Scalar View and the Standard View

The controversy between standard (maximizing) consequentialism and scalar consequentialism focuses on the overall moral status of actions. Both begin with the same account of what is good and bad: a ranking of states of affairs from the best to the worst. They differ, however, regarding the normative implications of this evaluation. Standard consequentialism holds that it is always obligatory to perform the action whose overall consequences are the best, and accordingly that it is always wrong to perform any other action, including actions whose overall consequences are just slightly less good than the best. In this way, standard consequentialism draws a sharp, dichotomous, discontinuous distinction between actions that are right and actions that are wrong. For this reason, standard consequentialism is considered to be a very demanding theory, since the only action that is not wrong may involve a high cost to the agent.

Scalar consequentialism ranks *actions* in the same way that every consequentialist theory ranks states of affairs, from the best to the worst, noting the degree to which each action is better or worse than other actions. Scalar consequentialism accordingly entails that there is a reason in favor of performing an action that is better rather than an action that is worse, and accordingly a reason against performing an action that is worse rather than one that is better; that the force of these reasons depends on the degree to which the relevant action is better or worse than alternative actions; and, finally, that there is most reason to perform the best action (the one whose consequences are the best). However, scalar consequentialism does not classify actions as obligatory, permissible, recommended, or wrong (to the degree to which these terms go beyond the former evaluations). Scalar consequentialism thus rejects the premise that underlies the controversy regarding the demandingness of morality – a premise that both standard consequentialism and standard deontology assume – that there is a morally significant distinction between actions that are obligatory and actions that are recommended but not obligatory.

A few points regarding this controversy are worth noting at the outset. First, the controversy concerns the theoretical question of what the accurate way to depict the relevant part of morality is—and not the practical question of what the most useful way of talking is, for example. In the latter respect, the answer is presumably different in different factual settings. For example, it may be useful to refer to certain actions that are not optimal as "wrong" if

this will influence some people so that they perform instead better actions. But this in itself is merely an efficient way of manipulating the relevant persons.

Second, the controversy focuses on the standard (maximizing) and the scalar versions of consequentialism. But it seems to be relevant also to other forms of consequentialism. Specifically, it is relevant to satisficing consequentialism, which holds that every action whose overall consequences are "good enough" is permissible.[35] For this version too, like the standard, maximizing, version, draws a sharp line between what is permissible and what is wrongful—albeit a different one. Therefore, salient arguments for and against the standard (maximizing) version of consequentialism, which focus on this shared feature, apply also to satisficing consequentialism.

Scalar consequentialism thus presents a radical option relative not only to other forms of consequentialism, but also to standard deontological theories, and indeed more generally to common, including less theoretical, accounts of morality, in that it rejects the standard distinction between actions that are right (obligatory or at least permissible) and actions that are wrong (those that violate a duty).[36] Is this radical option plausible then? Here are the arguments that I find most compelling in the debate between standard and scalar consequentialism.[37]

2. The Arguments for the Scalar View

I think that the most compelling argument in favor of scalar consequentialism, and against the standard forms of consequentialism, is that the scalar option reflects all the morally significant facts, and only these facts, with regard to

---

35 *See, e.g.*, Michael Slote & Philip Pettit, *Satisficing Consequentialism*, 58 Proc. Aristotelian Soc'y 139 (1984).

36 The radical nature of scalar consequentialism is emphasized, for example, by Brad Hooker, *Right, Wrong, and Rule Consequentialism*, *in* The Blackwell Guide to Mill's Utilitarianism 233, 239 (H. West ed., 2006) [hereinafter: Hooker, *Rule Consequentialism*].

37 There are other arguments in favor, and against, scalar consequentialism that are unsound, it seems to me. One example is the claim that the force of the reason to influence a person to do more good does not depend on the question whether, as a result, her action would be obligatory or not. See Alastair Norcross, *The Scalar Approach to Utilitarianism*, *in* The Blackwell Guide to Mill's Utilitarianism 217, 220-21 (H. West ed., 2006) [hereinafter: Norcross, *The Scalar Approach*]. While the conclusion of this argument is correct, I think that this is the case because the overall moral status of the action of one person is not, in itself, a reason for or against the actions of others, in light of or in response to the former action. See Segev, *supra* note 12. Therefore, this conclusion does not support scalar consequentialism.

the overall moral status of actions, by ranking states of affairs and actions from the best to the worst; whereas the standard versions assign weight to facts that are not morally significant by distinguishing between actions that are right and actions that are wrong in ways that go beyond the scalar ranking.[38] The scalar version reflects all the pertinent morally significant facts, and only these facts, by distinguishing between alternative actions from the best to the worst, noting the degree to which each action is better or worse than alternative actions, and accordingly the force of reasons for and against every action, as compared to all other possible actions. Indeed, the scalar view accurately reflects the fact that the degree to which actions are sensitive to the pertinent considerations, especially those that focus on consequences, appears to change gradually. Finally, the scalar version does not refer to other facts, which are not morally significant (in the relevant respect, that is, to the overall moral status of actions), for example, the fact that one action is the best—as opposed to the degree to which it is good or bad in absolute terms or as compared to the alternatives.

The standard version, in contrast, assigns too much weight to the distinction between the best possible action and all other alternative actions, by classifying the best action as right—indeed as obligatory—and all other actions as wrong. This dichotomous distinction is misleading in several related ways. Generally, it is misleading since actions reflect the pertinent moral considerations in better and worse ways. And it seems that at least according to plausible and common accounts (especially but not only consequentialist ones), a significant part of this spectrum of the value of moral considerations is continuous. Moreover, the overall evaluation of states of affairs appears to be at least mostly continuous, according to plausible and common accounts, and it is implausible to assume that the best action is necessarily and thus always very different from all other actions.[39]

The more specific ways in which the dichotomous distinction between the best action and all other actions is misleading are the following. First, in its treatment of the best action as compared to actions that are not far from the standard versions of consequentialism draw a sharp distinction between the

---

38 For arguments in this spirit, see Alastair Norcross, *Good and Bad Actions*, 106 Phil. Rev. 1 (1997) [hereinafter: Norcross, *Good and Bad Actions*]; Alastair Norcross, *Contextualism for Consequentialists*, 20 Acta Analytica 80 (2005); Norcross, *The Scalar Approach*, *supra* note 37; Norcross, *Reasons Without Demands*, *supra* note 8; Kevin Tobia, *A Defense of Scalar Utilitarianism*, 54 Am. Phil. Quarterly 283 (2017); Neil Seinhababu, *Scalar Consequentialism the Right Way*, 175 Phil. Stud. 3131 (2018).

39 *See* Re'em Segev, *Sub-Optimal Justification and Justificatory Defense*, 4 Crim. L. & Phil. 57, 69 (2010).

best action (the "right" and indeed the "obligatory" one) and actions that are very similar to the best action in terms of all the underlying moral factors. For example, scalar consequentialism often grades the best action as perfect (A+, or 100%, say), and a second best action that is almost as good as the best, as almost perfect (A, or 98%, for example). In contrast, the standard, maximizing, version of consequentialism describes the latter action as wrong (F!), even though it is almost perfect in terms of its overall consequences.

In addition, the dichotomous distinction of standard consequentialism is misleading in that it classifies all actions that are not the best together—as wrong—although there may be (and often are) huge differences between them (in ways that are morally significant): the second best option may be almost perfect, for example, whereas the worst option may be awful. And yet both are classified by the standard version of consequentialism together as wrong.

Indeed, the latter difference—between the second best action which ranks very high, although it is not perfect, and the worst, awful, option—is typically much more significant than the difference between the best action and the second best action that is almost perfect. Since there are typically numerous alternative actions, and there are substantial differences between many of them, the scalar version evaluates common actions—which are typically neither the best nor the worst and indeed far from both the best and the worst options—more accurately than the standard version. Consider, for example, how much money a certain well-off person should give each month to the people who are overall most deserving (say, in terms of their level of wellbeing and their level of virtue), taking into account the good effects of the action, on the one hand, and its cost to the agent, on the other hand. Assume that giving US$1000 would have the best consequences overall, that giving US$990 would have overall consequences that are almost as good—just slightly less good than giving US$1000—and that giving nothing would have overall consequences that are very bad. The standard, maximizing, view considers giving US$1000 to be obligatory and giving both US$990 and nothing to be wrong.

To be sure, the standard account of consequentialism may, and typically does, recognize that there may be important differences between actions that are all classified as wrong: some are worse than others. However, the standard account still classifies all of these actions as wrong, and this classification appears to be not only redundant—since it adds nothing that is morally significant to the ranking of actions, from the best to the worst—but also misleading, because we usually introduce classifications only when they are informative.

The essence of this argument against the standard, maximizing, version of consequentialism applies also against the less common version of satisficing consequentialism. For this version too draws a dichotomous distinction

between actions that are permissible and actions that are wrong—between actions whose overall consequences are "good enough" and other actions—although the difference between the former and the latter actions, in terms of their overall consequences, may be trivial. Even if the line that separates actions whose overall consequences are "good enough" from other actions is vague, it is still the case that satisficing consequentialism distinguishes between actions that are wrong and actions that are right in a way that goes beyond the underlying differences between their consequences.

In these respects, the scalar version reflects the overall moral status of actions better than the maximizing and the satisfying versions of consequentialism, especially since the latter versions seem to attach too much significance to trivial differences. Regardless of where the line is drawn by the maximizing and the satisfying versions, the difference between some actions that are classified as right and some that are classified as wrong may be very small, while the differences between actions that are all classified as wrong may be huge, due to the continuous nature of the relevant variables.

These advantages of the scalar account with regard to the evaluation of the moral status of actions carry over to the evaluation of the moral status of agents to the extent to which people are praiseworthy or blameworthy in light of their actions. In addition, even if, or to the degree to which, the moral status of agents does not depend on the moral status of their actions, similar arguments seem to apply in favor of a scalar version of the moral status of agents.

3. The Arguments for the Standard View

The main argument against scalar consequentialism, and in favor of standard consequentialism, is that a moral theory should include not only evaluative components that are merely comparative, but also deontic components that provide guidance by determining what should—and what should not—be done.[40] Scalar consequentialism, which only ranks actions from the best to the worst, does not include such guidance, according to this argument. More specifically, according to this line of thought, first, the best action is qualitatively and not only quantitatively different than the second best action, even if the overall consequences of the latter are just slightly less good than those of the former, since the best action is the one that should be performed. A similar claim against scalar consequentialism is made with respect to the other side of the spectrum: that some actions should be classified as wrong,

40 *See* Rob Lawlor, *The Rejection of Scalar Consequentialism*, 21 Utilitas 100 (2009).

for example, torturing people for fun.[41] According to this argument, scalar consequentialism fails in that it only says that such actions are very bad, without classifying them as wrong.

Despite its intuitive appeal, however, I think that this objection is unpersuasive. Scalar consequentialism seems to provide all the guidance that should be provided by a foundational standard with regard to what we should, and should not, do. Moreover, while scalar consequentialism reflects all the facts that are morally significant in this regard, the standard version adds propositions that are either redundant or mistaken, depending on how they are understood. While making claims about the rightness or wrongness of actions may be *useful* sometimes, such claims do not add *information* that is morally significant.

Note, first, that a scalar account does point out which action is the best and accordingly which action is the most commendatory and there is most reason to do. It does not classify this action, in addition, as obligatory, but this is because this classification adds nothing that is morally important to the former propositions, and it is therefore redundant and thus misleading.

Moreover, a scalar account points out not only which action is the best but also, with respect to each action, if it is better or worse compared to every other possible action, and by how much. Accordingly, a scalar account entails reasons for and against each action, as compared to every alternative action, and points out the *force* of such reasons: that the reason to prefer one action over an alternative one is (much or just slightly) stronger or weaker than the reason to prefer the former action to a third alternative action, for example. This is important given that most actions (both possible actions and typical actions) are neither the best nor the worst but rather somewhere in between these extremes: they are better than some alternatives—much more than some, slightly more than others—and worse than some alternatives—again, significantly more than some and merely trivially more than others. Thus, the scalar account points out that there are reasons not only in favor of the best action but also in favor of actions that are not the best—since they are better, often much better than other alternative actions—as well as reasons against them, to the extent that they are worse than others.[42]

Is there anything that a scalar account still misses, as compared to the standard account? Specifically, do concepts such as duty, obligation, requirement and demand add information that is morally significant to the information that

---

41 *See* Hooker, *Rule Consequentialism*, *supra* note 36, at 239.

42 *See* Norcross, *Good and Bad Actions*, *supra* note 38 at 32; Brian McElwee, *The Rights and Wrongs of Consequentialism*, 151 Phil. Stud. 393 (2010); Seinhababu, *supra* note 38.

the scalar account provides? It seems to me that the answer is negative. Any classification that goes beyond the information provided by the scalar view—including one that is based on concepts such as duty—is not only redundant but also arbitrary and misleading, since it implies that such information does exist.

It is important to recall that this conclusion concerns the theoretical question regarding what the accurate way is to depict the relevant part of morality, and not the question of what is more natural to say in some contexts or the practical question of what is more useful to say. It may well be more natural to depict certain actions as simply right or wrong, rather than, for example, the best (this is partly, but perhaps not only, just because the common view is, well, common). This may be the case, for instance, since sometimes it is sufficient to focus on the most salient options. Indeed, typically most options are not salient, inter alia, in the sense that the relevant agent does not consider them seriously (and indeed does not even notice most of them). And with regard to the (often very few) salient options, it is sometimes clear that one is much better or worse than the others. In such cases, it may be less cumbersome, albeit less accurate, to describe the relevant actions as obligatory and wrong rather than as better and worse, to various degrees, than all of the alternatives. But this does not affect the conclusion that what is fundamentally more accurate is the latter option (taking into account, inter alia, the fact that with regard to most actions that are naturally described as wrong, there are even worse alternative actions, for example). It may also be more useful sometimes to use terms such as "duty" and "wrong" when this brings about optimal consequences, in terms of influencing the actions of people.[43] But this too is irrelevant to the present discussion.

It therefore seems to me that at the end of the day the less common and more radical option of scalar consequentialism is more plausible than the standard option of maximizing consequentialism (and the option of satisficing consequentialism). The stark distinction between permissible and wrongful actions is out of place, at least given a consequentialist outlook. Accordingly, the first premise of the Continuity Argument is reasonable at least regarding the parts of morality that are concerned with the overall moral status of actions and agents, but only if we accept, as I think we should, a radical and unpopular view.

---

43 However, it is also worth noting that this is not obvious. Indeed, it is reasonable to assume that sometimes the opposite is the case and that the more accurate view is also the more useful one. Perhaps, for example, some people would be willing to help others more if we say just what is better or worse than if we say that only a certain action is the right one and all others are wrong, since they find the former action to be too demanding.

The extent to which this conclusion is radical depends on the meaning of terms such as "duty" and "wrong." If their meaning is just the "best" and the "worst" (or similar notions such as "good enough" and "very bad"), respectively, and they come in addition rather than instead of other concepts that emphasize the continuous nature of morality, mainly comparative notions, then there is no theoretical difference between the scalar version and other versions. (Of course, in this case, these terms are redundant and misleading.) However, to the extent to which terms such as "duty" and "wrong" are understood in the more common way, which is more robust, then there is a difference between the scalar version and other versions, and this difference is more significant in accordance with the degree to which the meaning of these terms goes beyond the prescriptions of the scalar version. Therefore, if the traditional, inflated, meaning of these terms is entrenched, discarding them would lead to propositions that are more accurate.[44]

My conclusion is therefore that the first premise of the Continuity Argument is plausible, at least regarding the part of morality that is concerned with the overall moral status of actions and agents. I have argued that pro tanto considerations, especially those relating to the consequences of actions, are often continuous, and that, due to this fact, overall conclusions regarding the moral status of actions and agents should also be continuous. However, this conclusion does not follow from common assumptions regarding the nature of (the relevant part of) morality, and indeed it is incompatible with the common view that draws a sharp distinction between right and wrong actions. This conclusion is compatible only with a minority view that endorses a scalar assessment of the overall moral status of actions and agents. Therefore, in order to clear the way to the Continuity Argument, we must confront the above arguments for and against this view.

II. The Second Premise: The Morality of Law

The second doubt regarding the Continuity Argument concerns its second premise, according to which the law should track the relevant part of morality—the overall moral status of actions and agents—*usually*. I begin by explaining this doubt, inter alia by highlighting the facts that the considerations for and against legal continuity are ultimately the same type of considerations, and also the fact that the law is merely a means and not valuable in itself. I then

44 This discussion may of course have other lessons, for example, regarding the question whether consequentialism or other moral theories are too demanding.

consider and reject the objection that there are decisive considerations in favor of legal continuity.

A. The Considerations For and Against Continuous Laws

The second premise of the Continuity Argument focuses on the part of morality that is concerned with the overall moral status of actions and agents. It is important to note that the argument is *not* about the *all-things-considered* moral conclusions *regarding the law*. It is of course trivially true that the law should track the all-things-considered moral conclusions regarding the question of what the law should be (this is, of course, true not only usually but always). But this observation does not support legal continuity (in the sense employed by the Continuity Argument). It does, however, highlight an important (and non-trivial) fact: that the answer to the question of what the law should be depends on the conclusions that follow from the interaction of all the applicable considerations. Therefore, when we consider whether (or when) the law should track the overall moral status of actions and agents, we should bear in mind that there are often not only considerations in favor of legal continuity but also considerations against legal continuity.

Moreover, the considerations for and against legal continuity are, ultimately, the same type of considerations, for example, considerations against undeserved suffering or in favor of maximizing wellbeing, and the applicability and force of these considerations depend not only on various moral propositions but also on contingent facts. For example, there is a desert-based consideration in favor of legal sanctions that accurately reflect the degree to which the relevant persons are blameworthy, but there is also a consideration in favor of a law that tracks blame less accurately if such a law prevents more undeserved suffering. This may be the case, for instance, if such a law prevents (intentional or unintentional) actions that cause undeserved harm more efficiently than other options, or if it is less costly and the resources that more accurate tracking requires may prevent the suffering of innocent persons if used elsewhere.

The considerations for and against legal continuity are, ultimately, the same type of considerations inter alia because the value of the law is merely instrumental: the law is merely a means and not valuable in itself. In other words, the law is never a constitutive element of *foundational*—the most basic—moral standards. Foundational moral standards do not refer to the law, and standards that do refer to the law are not foundational but rather derive from more basic ones. This observation implies that the fact that a certain moral factor—such as the overall moral status of actions—is continuous is not *in itself* a reason for or against a *law* of a certain type. Rather, there is a reason in favor of a law that tracks this factor only if such a law promotes a value that is

independent of the law.[45] For example, there is no foundational consideration against undeserved *legal* sanctions, but rather against the undeserved *effects* of the law in terms of a value that is independent of the law. According to one suggestion, for example, what culpable wrongdoers deserve is defined in terms of wellbeing. For instance, they deserve to *suffer* (in proportion to their culpability). This view is defined independently of the law (and thus could be promoted also by non-legal means). Therefore, it is compatible with the assumption that the value of the law is merely instrumental. In contrast, views according to which the foundational currency of desert is the law itself (for example, that culpable persons deserve *legal* punishment)[46] are incompatible with this assumption and are therefore implausible, it seems to me.

The fact that the considerations for and against legal continuity are, ultimately, the same type of considerations, highlights anohter fact: the degree to which the law (at a certain place and time) should track the relevant part of morality depends not only on moral questions but also on the answers to empirical questions concerning, inter alia, the effects of numerous alternative laws (answers that determine the degree to which alternative laws promote foundational considerations). Consequently, in order to determine whether a certain law should track the relevant part of morality, more or less accurately, including whether it should do so usually, as the second premise of the Continuity Argument holds, an extensive inquiry regarding these moral and empirical questions is required. Therefore, I do not think that we have the evidence to determine that it is more likely that the law, at a certain place and time, should track morality usually, or less than it in fact does.

Kolber occasionally acknowledges that the overall moral conclusion may be that the law should *not* be continuous sometimes, since the considerations in favor of legal continuity may be defeated by opposing considerations.[47] However, he emphasizes mainly the former considerations (in favor of legal continuity) while underplaying, and occasionally even ignoring, the latter (against legal

---

45 *See* Re'em Segev, *Should Law Track Morality?*, 36 Crim. Just. Ethics 205 (2017).

46 It is sometimes claimed, for example, that retribution is a political value in the sense that only the state can promote retribution by imposing legal punishment. See, for example, Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. Rev. 1659, 1694 (1992); Guyora Binder, *Punishment Theory: Moral or Political?*, 5 Buffalo Crim. L. Rev. 321 (2002), R.A Duff, *Towards a Modest Legal Moralism*, 8 Crim. L. & Phil. 217, 230-231 (2014), Alon Harel, Why Law Matters 96-98 (2014). For doubts regarding this view, see, for example, Benjamin Ewing, *The Political Legitimacy of Retribution: Two Reasons for Skepticism*, 34 L. & Phil. 369, 371-72 (2015).

47 *See* Kolber, *Smooth and Bumpy Laws, supra* note 2, at 687.

continuity). He sometimes says, for example, that the considerations in favor of legal continuity are considerations of "justice," whereas the considerations against legal continuity are "practical" considerations.[48] This is misleading since these are the same foundational considerations. He also writes often that when a law does not track a continuous moral factor, morally significant information is "destroyed" or, alternatively, that there is a "rounding error," since morally significant continuous information is not reflected in the law.[49] This is misleading in two related ways. First, moral information is not lost when a consideration against legal continuity defeats a consideration in favor of continuity: the latter is not ignored but is weaker than a clashing consideration. For the same reason, it is misleading to say that there is a rounding error when a consideration in favor of continuity is defeated, since, by hypothesis, there is no error when a decisive consideration is followed and a consideration that is defeated is not followed. To be sure, there is a morally significant *cost* in this case, but since this cost is, again by hypothesis, less significant than the cost involved in the alternative course of action, there is no error. Second, even the misleading sense in which morally significant information is lost (or there is a rounding error) applies equally if a consideration *against* legal continuity is defeated. For in this case too, there is a morally significant cost.

B. Are There Decisive Considerations in Favor of Legal Continuity?

In response to my claim that there is no reason to think that it is more likely that the law (in general or at a certain place and time) should track morality usually, it may be argued that sometimes the law should track the overall moral status of actions and agents regardless of the consequences of doing so, since there are considerations in favor of tracking continuous moral factors through the law that are always, or at least almost always (and not only usually), decisive. The most common suggestion focuses on considerations against undeserved legal sanctions, that is, legal sanctions that do not reflect the degree to which the relevant actions are wrong or the relevant agents are blameworthy (including, of course, actions that are not wrongful or agents who are not blameworthy at all).

This suggestion seems to me implausible. Since the law is merely a means, and therefore both the reasons for and the reasons against any law are ultimately the same type of (foundational) reasons, the relevant conflict in not between different types of considerations—for instance, between considerations of "justice" and "pragmatic" considerations. For example, while the reason against

48 *Id.* at 659.

49 *Id.* at 663, 682.

undeserved suffering sometimes supports, *in one respect*, a (continuous) law that accurately tracks the degree to which a person is blameworthy, the same reason may also militate against such a law – namely, support a law that is discontinuous, *in another respect*, for instance, if it prevents (intentional or unintentional actions that cause) undeserved harm more efficiently, or if it is less costly and the resources that a continuous law requires may prevent the suffering of innocent persons if used elsewhere.

Therefore, it is unreasonable to assume that the reason against undeserved suffering always (or even almost always) supports a law that is continuous in the sense that is relevant to the Continuity Argument. Indeed, the overall conclusion may often be in favor of a law that imposes a sanction that does not accurately track blame (namely, an undeserved sanction). In such cases, the law may be justified, all things considered, although it is discontinuous in that it imposes sanctions that do not reflect accurately the degree to which the relevant people are blameworthy. For example, there is a reason against requiring a person whose action harmed another unjustifiably to pay the entire cost of the harm if, as a result of this payment, this person would suffer more than she deserves to suffer. However, the same type of reason also requires such a payment if without it another person would suffer an undeserved harm. Hence, there is no reason to assume that the considerations against undeserved legal sanctions always support, at the end of the day, a law that tracks a continuous moral factor rather than a law that is discontinuous. Since the pertinent reasons—for and against legal continuity—are often the same type of reasons (for example, a reason against undeserved suffering), the tendency to prefer the reasons for, rather than against, legal continuity seems to be at least partly due to a bias towards the short term as opposed to the long term (assuming that the suffering that the criminal law prevents is more often in the long term compared to the suffering that it causes).

Moreover, the consideration against undeserved legal sanctions is not the only moral consideration. Therefore, even when this consideration supports a continuous law, it may be defeated by another consideration, for example, in favor of giving priority to the worse-off or maximizing wellbeing.

A retort could be made that there is nevertheless a narrower consideration against undeserved suffering that is (almost) always decisive and accordingly opposes legal discontinuity in the form of punishment that is not proportional in terms of desert. The most common claims in this regard appeal to deontological constraints against *intentional* undeserved suffering, or even more specifically, against undeserved *punishment* or even just undeserved *legal* punishment. (Considerations relating to consequences, even those that focus on desert, are less often considered to be absolute or even almost absolute.) These suggestions are based on the common claim that considerations of desert

are not symmetrical (at least or especially) when it comes to (intentional) punishment, particularly legal punishment. Rather, according to this view, the consideration against undeserved (criminal) punishment is much more important than the consideration in favor of preventing undeserved harm that is not in the form of (legal) punishment.[50]

Note that these suggestions are very limited: they concern only intentional harm, or punishment, or legal punishment. Therefore, they do not support the Continuity Argument in its general form. They do not apply, for example, to laws that do not impose punishment in the relevant sense.

I believe, moreover, that even these limited suggestions are implausible. The version that refers to *legal* punishment is implausible since it is incompatible with the assumption that the law is merely a means and is therefore not a constitutive element of a foundational moral standard. The other versions are compatible with this assumption, but they are implausible in another way: while there is a foundational reason against undeserved suffering, and thus a derivative reason against punishment, including legal punishment, that does not accurately reflect the degree to which the relevant person is blameworthy, it is unreasonable to hold that this reason is always, or even almost always, decisive. It is one thing to argue that something (such as desert) is valuable; it is a very different thing to argue that this value defeats every other value, or combination of values, in every possible case, or even that this is almost always the case. The former claim is plausible; the latter is not. Indeed, even the suggestion that this reason is often decisive is far from obvious.

One argument against the claim that the reason against imposing undeserved punishment is (almost) always decisive is based on the proposition that the force of the pertinent reasons, for and against undeserved punishment, is a

---

50 Many believe that it is (almost) always wrong to use the criminal law against actions that are not wrong. See, for example, Husak, Overcriminalization, *supra* note 1, at 65-66, 76-77; A.P Simester & Andreas von Hirsch, Crimes, Harms, and Wrongs: On the Principles of Criminalisation (2011); A,P Simester, *Enforcing Morality*, *in* The Routledge Companion to Philosophy of Law 482, 483 (Andrei Marmor ed., 2012); Duff, *supra* note 46, at 218-21; Antje du Bois-Pedain, *The Wrongfulness Constraint in Criminalisation*, 8 Crim. L. & Phil. 149 (2014); John Danaher, *Robotic Rape and Robotic Child Sexual Abuse: Should They be Criminalised?*, 11 Crim. L. & Phil. 71, 77 (2017). Others believe that it is (almost) always wrong to use the criminal law against persons who are not blameworthy. See, for example, Alexander, *Strict Liability*, *supra* note 9, at 532; Husak, Overcriminalization, *supra* note 1, at 82-83; Jeffrie G. Murphy, *Last Words on Retribution*, *in* The Routledge Handbook of Crim. Just. Ethics 28, 31 (Jonathan Jacobs and Jonathan Jackson eds., 2016); Michael Moore, *Legal Moralism Revisited*, 54 San Diego L. Rev. 441, 445 (2017).

matter of degree. Therefore, the reasons in favor of undeserved punishment may be (relatively) strong, and the reasons against doing so may be (relatively) weak. When this is the case, it is plausible to conclude that the former defeat the latter. Moreover, this may be the case not only in very rare cases but more often.

Consider first the considerations in favor of punishment. The force of these considerations is a function of the degree to which the consequences of punishment are good, for example, in terms of maximizing wellbeing or promoting distributive or retributive justice, for instance, when punishment deters harmful actions and thus prevents undeserved suffering. It may be thought that some of the goals that are associated with punishment or the criminal law—such as preventing wrongful harm and exacting retribution—can be promoted only by imposing (criminal) punishment on people who are blameworthy to the degree that justifies this punishment. However, the criminal law may promote moral goals that are ultimately related to wrongdoing and culpability even when it applies to people who are not blameworthy, for example, since there are often reasons to enact and enforce prohibitions whose ultimate goal is to prevent undeserved harm also with respect to actions that do not involve such harm or agents that are not blameworthy, due to the cost of distinguishing or separating various types of actions and agents. There are, in other words, reasons in favor of (enacting and enforcing) criminal prohibitions that are over-inclusive or not perfect in terms of desert alone.

In this way, the justification of undeserved (criminal) punishment *is* based also on goals that focus on wrongdoing and blame. And the force of the considerations in favor of such punishment depends on the degree to which it prevents wrongful harms or promotes retribution, for instance. Thus, there may be strong considerations even in favor of punishing people who do not deserve the relevant punishment.

Indeed, many common criminal offenses appear to reflect this type of reasoning. These include, generally, many prohibitions that are in the form of rules rather than principles. Consider, for instance, a common speed limit offense.[51] The reasoning that underlies such an offense is presumably the combination of the following assumptions. First, driving is sometimes justified and sometimes not, depending, inter alia, on the extent to which it

---

51 This type of examples is discussed, in this context, by R.A. Duff, *Crime, Prohibition, and Punishment*, 19 J. Applied Phil. 97, 102 (2002); Alexander & Ferzan, *Crime and Culpability*, *supra* note 9, at 302-4; Simester & von Hirsch, *supra* note 50, at 28; James Edwards, *Criminalization Without Punishment*, 23 Legal Theory 69 (2017); Andrew Cornford, *Rethinking the Wrongness Constraint on Criminalisation*, 36 L. & Phil. 615 (2017).

causes undeserved harm. Similarly, when driving is wrong, and the driver is blameworthy due to her action, the degree to which the action is wrong, or the driver blameworthy, depends (also) on the extent to which it causes undeserved harm. Second, the answers to the questions whether the action is justified and to what degree a wrongful action is wrong or a blameworthy driver blameworthy depend on many variables, including the capabilities of the driver, the condition of the car and the road, the weather and the reason for driving. Therefore, the speed that is justified is different in different cases. Similarly, the degree of wrongfulness and blame that are involved in driving at a certain speed are different in different cases.

Third, the best way to prevent unjustified harm is often not a criminal prohibition on "unjustified risks," or a punishment that accurately reflects wrongness or guilt (principles), but rather one that proscribes exceeding a specific speed limit (a rule), or a punishment that does not reflect the degree of wrongness or blame accurately. Such rules are less accurate than principles in terms of the moral status of the relevant actions: they are over-inclusive in that their ultimate rationale is concerned with actions that are wrongful and harmful (to a certain degree) but they cover also other actions, which are permissible and harmless or less wrongful or less harmful. However, these rules are often better than the alternative principles in terms of guiding drivers and the officials who enforce the law, since it is often difficult to determine correctly what the relevant principle requires in specific circumstances. This consideration in favor of an over-inclusive criminal offense is forceful if such an offense prevents accidents more efficiently and thus prevents more suffering that is undeserved as compared to a principle that tracks blame accurately.

Consider next the force of the consideration *against* punishment that involves undeserved harm. The force of this consideration is also a matter of degree. It depends, most notably, on the degree to which the excessive punishment is serious. Generally, the consideration against disproportionate punishment that is severe, such as a long prison sentence, is much stronger than the consideration against disproportionate punishment that is milder, such as a modest fine. (The same is true of condemnation to the degree to which it is not part of the punishment.)

Thus, it seems reasonable to conclude that criminal punishment is sometimes justified, all things considered, despite the fact that it involves undeserved harm.[52] For example, when a speed limit offense prevents many accidents and

---

52 *See* Fredrick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991); Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law (2001); Alexander & Ferzan, *Reflections*, *supra* note 9 at 50.

thus saves many lives by imposing a relatively mild fine it seems to be justified overall even if it leads to punishment that does not reflect blame accurately.[53]

The objection that there is a deontological constraint against undeserved punishment that is not a matter of degree and specifically not sensitive to the degree of punishment (and condemnation)—and that this consideration is nevertheless (almost) always decisive—is implausible. This is true more generally. While the answer to the question of when harming an innocent person is justified is complex and controversial, it is clear and widely accepted that the answer is not "never." For example, it does not seem wrong to break the finger of an innocent person when this is the only way to prevent a very serious injury to another innocent person or to save the lives the several innocent persons. Since the harm involved in using a criminal law that carries relatively mild punishment (and condemnation), for example, a fine due to speeding, is often not more serious than a broken finger, all else being equal, it is implausible to assume that it is wrong to enact and enforce this law if this promotes an important goal such as preventing serious harm that is undeserved by preventing accidents.

Indeed, a more general argument against the claim that there is (almost) always a decisive reason against undeserved punishment is an analogy argument. The view that harming people is sometimes justified even when it is not deserved, mainly in order to prevent a more serious harm to innocent people (as in the broken finger case), is plausible and widely accepted (by both consequentialists and deontologists). Indeed, it is widely agreed that even *serious* harm to people that are completely innocent is sometimes justified, for example, diverting a trolley that would otherwise kill five persons to a track on which it would kill only one.[54] This common view is typically reflected in the law, which often permits harming innocents. This includes the criminal law itself, which frequently includes justificatory defenses, such as lesser evil, necessity and self-defense, that permit harm to innocents (innocent aggressors in the case of self-defense), when this is required in order to prevent a more serious harm to other innocents. Therefore, the question is whether we should accept the opposite conclusion with regard to criminal punishment, namely,

---

53 *Cf.* Simester & von Hirsch, *supra* note 46, at 251. Alexander & Ferzan, *supra* note 9, at 295-306 argue that the criminal law should be generally composed of standards rather than rules, since rules are less accurate in the relevant respect. However, they acknowledge the costs that standards often involve and accept that, due to these costs, a rule is sometimes justified.

54 Empirical results suggest that around 90% of the respondents accept this judgment. For a survey of pertinent empirical findings, see Fiery Cushman and Liane Young, *The Psychology of Dilemmas and the Philosophy of Morality* 12 Ethical Theory & Moral Prac. 9 (2009).

that it is (almost) never justified to impose underserved harm when this is done through the criminal law (as opposed to, inter alia, with the permission of the criminal law). I think that a positive answer is implausible. While the burdens imposed through the criminal law may be different from other burdens in various ways, it is not the case that it is often justified to harm innocents in other ways (mainly in order to prevent a more serious harm to other innocents) but (almost) *never* justified to do that through the criminal law.

Indeed, the morally significant differences between the criminal law and other ways in which individuals are harmed, including other forms of legal regulation, are often minor. This is the case, for example, regarding the difference between criminal offenses and "administrative offenses." Moreover, sometimes the criminal law involves only a minor degree of harm (and condemnation)—for example, a parking violation that involves a small fine—while some non-criminal laws involve severe harm (and condemnation)—for example, preventive detention, expropriation, revoking a professional license or an administrative sex offenders' registry. Therefore, a sharp distinction between criminal punishment and other burdens that are imposed by legal officials or other individuals is exaggerated.

The main objection to the analogy argument focuses on the differences between harming individuals by way of criminal punishment and by other means. One objection is that the criminal law is unique in that it involves condemnation or that the people who enact or enforce criminal offenses have an intention to condemn, whereas harming individuals in other ways does not involve condemnation.[55] However, while it is reasonable to hold that undeserved condemnation is (at least often) bad or unjust, for example, because, and when, it involves undeserved harm, the assumptions that only the criminal law involves condemnation, and that it always involves it, are false. On the one hand, other forms of legal regulation—including both private law and administrative sanctions—may involve condemnation. On the other hand, some criminal offenses—such as those that impose strict liability—may not involve condemnation. Moreover, condemnation is a matter of degree and criminal regulation does not always involve serious condemnation (especially in the case of over-inclusive offenses). Finally, with regard to the version that focuses on the *intention* to condemn, it is doubtful whether intentions are

---

55 *See, e.g.,* Douglas Husak, *The Costs to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility*, 3 Crim. L. & Phil. 51 (2009); Vincent Chiao, *Punishment and Permissibility in the Criminal Law* 32 L. & Phil. 729 (2013).

morally significant in themselves with respect to the justification of actions (as opposed to agents).[56]

Another claim is that it is (almost) never justified to impose undeserved harm through the criminal law since it is employed by public officials (or the state), although this being done by individuals who are not public officials is sometimes justified.[57] However, while there may be morally significant differences between individuals and public officials in terms of the justification of their actions, it is implausible to hold that they entail that the harming of innocents by individuals is often justified but by public officials (almost) never. Indeed, it is widely accepted that the harming of innocents even by public officials is sometimes justified, for example, when the harm is due to administrative sanctions.

A more specific argument is that while harming innocents in the cases that are covered by justificatory defenses is necessary, it is not necessary in the case of criminal punishment, but rather "merely instrumental in achieving various consequentialist goals."[58] Yet the (significance of the) difference between being "necessary" and being "instrumental" is unclear. And since the cases in which the criminal law is justified are those in which there is no better alternative, it seems that the criminal law is necessary in the sense that matters in the relevant respect.

Finally, a related suggestion is that the law allows individuals who are not public officials to harm innocents only in "emergencies," that is, when it is necessary to act *immediately*, whereas criminal punishment lacks this feature.[59] However, while the need to act immediately is often important as an indication that the action is necessary, it does not seem to be important in itself (in terms of the justification of harming innocents).[60] Therefore, this

---

56 *See generally* T.M. Scanlon, Moral Dimensions: Permissibility, Meaning, Blame (2008). More specifically, David Enoch, *Intending, Foreseeing and the State*, 13 Legal Theory 69 (2007); Adam Kolber, *Unintentional Punishment*, 18 Legal Theory 1 (2012); Chiao, *supra* note 55.

57 *Compare* Vera Bergelson, *Does Fault Matter?*, 12 Crim. L. & Phil. 375 (2018), *with* Douglas Husak, *Wrongs, Crimes, Criminalization*, 3 Crim. L. & Phil. 393 (2019).

58 Bergelson, *supra* note 57.

59 *Id.*

60 For an example of a defense that does not require a condition of immediacy, see Model Penal Code § 3.02 ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing

difference too does not seem to affect the conclusion that harming innocents by way of the criminal law is sometimes justified.

To conclude: there are typically considerations both for and against legal continuity. Moreover, these considerations are ultimately of the same type and their force depends also on various empirical facts. The considerations in favor of legal continuity include a consideration against undeserved punishment. This consideration may sometimes be decisive, but the claim that it is (almost) always decisive is implausible. Consequently, even in the context of the criminal law there is no reason to assume, without conducting extensive moral and empirical inquiries, that the law (at a certain time and place) should usually be continuous (or that it should be more continuous than it actually is).

III. An Example: Partial Defenses

The controversy regarding partial defenses in the criminal law illustrates several points regarding the Continuity Argument and the doubts concerning this argument. This is because some of the arguments for and against partial defenses focus on the degree to which morality is continuous in various respects and on the extent to which the law should be continuous as well, in order to reflect the relevant moral continuity. I therefore conclude by considering the lessons of the above discussion with respect to several aspects of the controversy about partial defenses. Let us begin with justificatory defenses, namely, defenses that focus on the moral status of the relevant actions and specifically exempt actions that are morally permissible. Consider first the flowing argument for *complete* justificatory defenses:

1. The criminal law should apply only to actions that cross a certain, minimal, threshold of wrongfulness (this is therefore a necessary but not a sufficient condition).[61]
2. Some of the legal rules that limit the scope of the criminal law to actions that cross a certain, minimal, threshold of wrongfulness should take the form of defenses.
3. Some of the above defenses should provide a complete exemption from criminal liability (and accordingly should be called "complete justificatory defenses").

---

with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.").

61 Note that this claim goes beyond the common claim that the criminal law should not apply to actions that are morally permissible.

Now consider a similar argument for *partial* justificatory defenses:[62]

1. When the criminal law should apply to wrongful actions, the severity of the punishment should depend, inter alia, on the degree to which the relevant action is wrong: other things being equal, an action that is less wrong should be subject to a lesser punishment.
2. Some of the legal rules that limit the scope of the criminal law to actions that cross a certain, minimal, threshold, of wrongfulness should take the form of defenses.
3. Some of the above defenses should provide a partial exemption from criminal liability (and accordingly should be called "partial justificatory defenses").

The propositions that comprise these arguments are plausible, it seems to me, but only given the following qualifications. The first concerns the common assumption, which is endorsed by several of the premises in the above arguments, that the criminal law should take account of the moral status of actions, including whether or not they are wrong, and to what degree. This assumption is plausible not only if the moral status of actions matters for the criminal law *in itself*. It is also plausible if the moral status of actions matters in this respect only since, and to the degree to which, it affects other factors that are morally significant in themselves, such as the effects of the law in

---

62 For arguments in this spirit, see Douglas Husak, *Partial Defenses,* 11 Can. J.L. & Juris. 167, (1998); Segev, *supra* note 39; Kolber, *The Bumpiness of Criminal Law, supra* note 2 at 870-72. These arguments are different from the arguments that I have in mind in several respects. For example, Husak claims that if a certain factor justifies a complete defense, then if this factor is present to a lesser degree, it justifies a partial defense. However, he refers to factors that are not important in themselves to the criminal law but rather, at most, only as proxies, for instance, age. In this sense, the above claim is inaccurate. It is implausible to hold that if a young age is a complete defense then an age that is less young should be a partial defense (as Husak suggests). For age matters, for the criminal law, only if, and to the degree to which, it affects another factor that does matter in itself, such as the degree to which the relevant person is blameworthy. And age does not always have this effect. For example, the difference between a person who is 50 years old and a person who is 40 years old is often not significant in this regard. The correct thesis is accordingly merely the more trivial claim that if, for example, the moral status of agents matters for the criminal law, then it should matter not only if a person is not blameworthy at all but also to the degree to which a person is blameworthy. Kolber suggests that the punishment in the case of partial defenses should reflect only the degree to which the action exceeds the minimal threshold of wrongness. But I do not think that the relevant considerations support this suggestion.

terms of preventing the bad consequences of actions or desert.[63] Second, on the assumption that the moral status of actions matters for the criminal law, the reason against using the criminal law against actions that are not wrong, or in a way that does not properly reflect the degree to which actions are wrong, is not necessarily decisive.[64] Third, the justification of every legal rule depends on its overall consequences. Therefore, both complete and partial justificatory defenses are justified in some factual settings but not in others. This means also that sometimes complete justificatory defenses are appropriate (since their overall consequences are optimal) and partial justificatory defenses are inappropriate (since their overall consequences are not optimal). But the opposite is equally true in other cases.[65]

These qualifications imply that the claims that the criminal law should not apply to actions that are not wrong, or are not wrong enough, are correct sometimes but not always. However, this does not imply that *legal* rules that exempt *every* action that is not wrong from the scope of the criminal law, or that require that the criminal law should be used in a way that properly reflects the degree to which the relevant actions are wrong, are necessarily out of place. For the overall consequences of such legal rules may be optimal even if the reasons against undeserved punishments are not always decisive. This may be the case, for example, if legal officials tend to use the criminal law too much, especially with regard to actions that are not wrong, or not wrong enough,[66] and legal rules that instruct them never to use the criminal law against actions that are not wrong to the required degree will bring the use of the criminal law against such actions closer to the appropriate level. In order to accommodate this point, I assume here that legal rules that accurately reflect the degree to which the relevant actions are wrong are optimal in terms of their overall consequences.

Fourth, whether a conclusion that the criminal law should not apply to certain actions should take the form of a legal *defense*, or other ways of excluding actions from the scope of the criminal law, such as excluding the relevant actions from the scope of criminal offenses to begin with, or relying on the discretion of the officials that enforce the law, also depends on the answer to the question of which alternative would bring about the best overall consequences. In order to sidestep this debate too, I assume, for the sake of the discussion, that defenses are the best alternative in this regard.

---

63 *See supra* Part II.

64 *See supra* Part II.B.

65 In this regard, I think that the connection between complete and partial justificatory defenses is weaker than what Husak seems to suggest. Husak, *supra* note 62.

66 *See* Husak, Overcriminalization, *supra* note 1.

Finally, whether or not such a defense should be called a "partial justificatory defense," a "complete justificatory defense," or something else also depends on the overall consequences of doing so.

Subject to these qualifications, it seems to me that the above arguments for complete and partial justificatory defenses are compelling. Since the conclusions of these arguments are conditional—they entail the relevant defenses only if their overall consequences are optimal—objections that focus on these consequences are beside the point. Some other objections to partial defenses are worth considering in the context of the Continuity Argument, however.

The first objection to partial justificatory defenses is that the idea of partial justificatory defenses involves a contradiction, since "justifications… seem to be indivisible and by nature binary: conduct is either justified and permissible or it is not."[67] This objection should be dismissed quickly;[68] even assuming, for the sake of the argument, that the term "partial justification" involves a contradiction, the above *argument* in favor of the relevant type of a legal rule is not contradictory, and a *legal defense* of the relevant type is not contradictory. Therefore, the objection is merely terminological: it is properly addressed simply by using a different term in order to describe the relevant legal rule—a term of art, if necessary.[69] Indeed, "when our language doesn't adequately express our thoughts, it's better to add expressions to our language than to abandon our thoughts."[70]

(It is worth noting also that the assumption that the term "partial justification" involves a contradiction is unwarranted. First, even if the standard meaning of the term "justification" is binary, the term "partial justification" is a different term. Moreover, the latter is a term of art and there is no reason to assume that those who use it are simply confused. Actually, those who use this term may acknowledge that it is odd given the common meaning of the relevant words.

---

67 Shachar Eldar & Elkana Laist, *The Misguided Concept of Partial Justification,* 20 Legal Theory. 157, 161 (2014). See also Suzanne Uniacke, Permissible Killing: The Self-Defense Justification of Homicide 13-14 (1994); Mark Dsouza, Rationale-Based Defences in Criminal Law 102 (2017).

68 Indeed, it seems that Eldar and Laist themselves do not consider this point itself as an objection. They acknowledge that "one may still wish to find some terminological use for partial justification. In this case, it will not do to charge one with incoherence or unintelligibility. Indeed, language can be stretched to fit the term." Eldar & Laist, *supra* note 67, at 163.

69 Recall that if the objection is concerned with the *consequences* of *using* certain terms, then it is compatible with the proposed argument for partial justificatory defenses since this argument is conditional: it applies only when such a defense has optimal consequences on balance in this respect too.

70 Seinhababu, *supra* note 38, at 3134.

They nevertheless use it since it has various advantages, most importantly, as I emphasize below, since it highlights the important common denominator of (the arguments for) complete and partial justificatory defenses.)

The next, and more important, objection is that partial justificatory defenses do not have enough in common with complete justificatory defenses and therefore classifying these defenses together is misleading.[71] Some claim, for example, that complete justificatory defenses have two features that partial justificatory defenses lack. One is that complete justificatory defenses guide prospective agents since they apply, or should apply, only to actions that are morally permissible, whereas partial justificatory defenses, which (should) apply to actions that are unjustified, do not provide the same type of guidance.[72] The other alleged difference is that it is morally wrong, and should be legally forbidden, to prevent actions that are covered by complete justificatory defenses, while this is not the case regarding actions that are covered by partial justificatory defenses.[73]

I think, however, that complete and partial justificatory defenses have enough in common to justify the classification of both types of defenses as *justificatory* defenses. Specifically, these categories have two important characteristics in common: both focus on the moral status of *actions*,[74] and both apply to some actions that are wrong. The latter observation, it is important to note, is true also regarding complete justificatory defenses since some actions are wrong only to a degree that does not justify the use of the criminal law (at all). Therefore, the assumption that complete justificatory defenses (should) apply only to actions that are not wrong, and in this way provide proper guidance to prospective agents, is false.

The other assumption—that actions that are covered by complete justificatory defenses should not be resisted—is also mistaken. The moral status of the action of one person does not determine, in itself, the moral status of the actions of others, including those that respond, in various ways, to the first action. This is the case not only if, as I have suggested, the moral status of actions, as opposed to the moral status of their consequences and of the agents who perform them, is not in itself important to others at all.[75] For even if the moral status of the action of one person affects, in itself, the moral status of the action of another, this factor is not always decisive; it may be defeated

---

71 Eldar & Laist *supra* note 67, at 163.

72 *Id.* at 159, 170.

73 *Id.* at 159, 161.

74 This is significant even if, as I believe, the moral status of actions matters only derivatively for the criminal law.

75 *See supra* Part II.

by other relevant factors that pull in the opposite direction. For example, if the consequences of the first action and of an action that interferes with it are different, their moral status is accordingly different in this respect. (The moral status of the relevant actions may be different also if there are agent-relative reasons and if the moral status of actions depends on the beliefs of the agents.[76])

This brings us to the final and most interesting point with regard to the Continuity Argument: the above objections to partial justificatory defenses are more plausible if they assume, as they seem to do, the common view that there is an important difference between actions that are right and actions that are wrong, even if this difference is due to a difference that is small, for instance, in the consequences of these actions. Therefore, if this view is misguided, and morality should take a more scalar form,[77] the difference between complete and partial justificatory defenses is not significant and indeed appears to be trivial. For both types of defenses apply to actions in light of their moral status, and more specifically, apply to actions since they are not wrong to a degree that justifies the use of the criminal law (or its use in a certain way). To be sure, complete justificatory defenses, unlike partial justificatory defenses, apply *also* to some actions that are not wrong at all. But, first, even complete justificatory defenses apply also to actions that are wrong. And more importantly, the difference between actions that are not wrong (at all) and actions that are wrong only in the sense that they are not perfect is sometimes trivial. If this is indeed the case, there does not seem to be much point in distinguishing between complete and partial justificatory defenses at all.[78]

A similar analysis applies to excusatory defenses, which focus on the moral status of agents rather than that of actions, given the common assumption that the two are related.[79] The claim that there should be partial excusatory defenses is less controversial than the suggestion that there should be partial justificatory defenses. However, if the moral status of actions and that of agents are related in the way that many assume, namely, if the moral status

---

76 *Id.*

77 *Id.*

78 In this respect, it may be true that "there is no meaning to partial justification under consequentialism, apart from saying that within the calculus, some good consequences of the act were weighed against the bad ones before the balance was found to be unfavorable, which can be said of most bad deeds." See Eldar & Laist, *supra* note 67, at 162. However, this does not entail that there is no room for partial justificatory defenses, as this observation applies also to complete justificatory defenses.

79 *See supra* Part II.

of agents depends (only or also) on the moral status of their actions, there is no difference between justificatory and excusatory defenses in this respect.

Conclusion

While the Continuity Argument is attractive, there are two main doubts with regard to it. One is that its first premise is incompatible with the common view that the overall moral status of actions is discontinuous, since there is an important difference between actions that are right (obligatory or permissible) and actions that are wrong (and between agents that are praiseworthy and agents that are blameworthy to the degree to which the moral status of agents depends on their actions). I believe, however, that this common view should be rejected in favor of a scalar view according to which we should rank actions from the best to the worst, noting the degree to which each action is better or worse than other actions, but should not classify actions as obligatory, permissible, or wrong (to the degree to which these terms go beyond the former evaluations). Therefore, I have argued that the first premise of the Continuity Argument is correct in this regard, although it is much more controversial than may be thought.

The second doubt regarding the Continuity Argument concerns the scope of the second premise of the argument, according to which the law should track the relevant part of morality and accordingly should be continuous as well. I have argued that there are often reasons against legal continuity, and not only in favor of legal continuity, and that the applicability and force of both types of reasons depend, inter alia, on contingent facts. I have also argued that the reasons against legal continuity, including against imposing underserved harm, are not always, or even almost always, decisive. Therefore, we often lack the evidence to determine the degree to which the law, at a certain place and time, should be continuous (and specifically that it should often be continuous).